IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1029 OF 2005
WITH
CIVIL APPLICATION NO.1230 OF 2005

Smt.Housabai Pandurang Tawar. ..Appellant.

V/s.

Subhash Shripati Patil & Ors. ..Respondents.

Mr.P.D.Dalvi for appellant.

Mr.S.V.Sadavarte for respondent Nos. 1 to 3.

CORAM: A.M.KHANWILKAR,J

DATE : JUNE 6, 2006.

JUDGMENT :

1. Heard counsel for the parties. Perused the relevant documents on record.

2. Admit.

3. Mr.Sadavarte waives notice for respondents.

4. As short question is involved, appeal is taken up for final disposal forthwith by consent.

5. This Appeal from Order takes exception to the Judgment and Order passed by the II Additional District Judge, Kolhapur in Regular Civil Appeal

No.74 of 2004 dated August 11, 2005, whereby the Judgment and Decree passed by the trial Court in favour of the Appellant came to be set aside and the matter has been remanded back to the Trial Court with direction to frame the issue as to whether the plaintiff is/was an agriculturist and refer the said issue to the revenue authorities. The Trial Court is further directed to refer issue No.4 framed by the Trial Court as to whether defendants prove that the sale deed of the year 1967 is barred by the provisions of the Bombay Prevention Fragmentation and Consolidation of Holdings Act, to be decided by the Competent authority for giving its findings thereon.

6. Briefly stated, the appellant/plaintiff claims to have purchased the suit land by way of sale deed dated 22nd June, 1967. Prior thereto the appellant/plaintiff was tenant in respect of the suit land which was owned by Mahadev M. Patil. The case of the appellant is that he purchased the suit land under the provisions of the Bombay Tenancy And Agricultural Lands Act by the said Sale Deed dated 22nd June, 1967. Further case of the appellant/plaintiffs is that the appellant was dispossessed by the respondents in 1991. Accordingly, the Appellant instituted suit for

possession and permanent injunction on 20th April, 1991 being R.C.Suit No.65 of 1991. It is not necessary to elaborately deal with all the factual matrix, as the same is not relevant for deciding the question that arises for consideration in the present appeal.

7. In the present appeal the question is whether the lower Appellate Court was right in remanding the case to the Trial Court by setting aside the Judgment and Decree which was passed in favour of the appellant with further direction to frame issue with reference to the provisions of Tenancy Act to be decided by the revenue authority and also to refer the Issue No.4 which pertains to provisions of Fragmentation and Consolidation of Holdings Act, to be decided by Competent Authority.

8. In so far as later direction is concerned, I have no hesitation in taking the view that the provision of Fragmentation and Consolidation of Holdings Act would mandate that the issue No.4 as framed will have to be decided by the competent authority under the said act. Issue No.4 framed by the Trial Court reads thus:

> "Whether defendants prove that the sale deed of the year 1967 is barred by the provisions of The Bombay Prevention of Fragmentation and Consolidation of Holdings Act ?"

Inevitably, that issue will have to be answered by the competent authority and the jurisdiction of the Civil Court to adjudicate the same is clearly barred by the provisions of Fragmentation Act. To that extent the order of remand passed by the Appeal Court while setting aside the findings recorded by the trial Court on Issue No.4 as referred to above needs no interference. That approach of the Lower Appellate Court will have to be upheld.

9. The question however, is whether the lower Appellate Court was justified in directing the Trial Court to frame the issue as to whether the plaintiff is/was an agriculturist at the relevant time and refer the same to be decided by the tenancy Authority. Indeed, if issue as to whether a person is/was agriculturist at the relevant time arose for consideration, the same will have to be answered only by the tenancy authority by virtue of provisions of Tenancy Act, 1947. There can be no two opinion on that score. However, I find substance in the argument canvassed on behalf of the appellant that it was wholly unnecessary to dwell upon the fact as to

whether the appellant was an agriculturist at the relevant time when the sale deed was executed. This is so because the respondents have not challenged the sale deed executed in favour of the appellant as back on 22nd June, 1967. On the other hand the said sale deed was executed by the Original land owner in favour of the appellant being tenant as per the provisions of the Tenancy Act. So long as the said sale deed was not challenged by the respondents, merely because the respondents pressed the issue in the written statement filed in the suit for possession and perpetual injunction filed by the appellant, to the effect that the plaintiff was not agriculturist at the relevant time and therefore, not entitled to purchase the suit land, that contention would be of no consequence. For the simple reason that civil court cannot go into that issue in absence of challenge to the said Sale Deed. For, the sale deed executed in favour of the appellant in respect of the suit land under the provisions of Tenancy Act presupposes that the appellant was tenant and agriculturist at the relevant time. It is common ground that the said sale deed is a registered Sale deed. Therefore, in the fact situation of the present case the court will have to proceed on the assumption that the sale deed, which is a registered

sale deed in favour of the appellant plaintiff, is operating and is a valid one. The question as to whether the appellant/plaintiff was agriculturist at the relevant time when the sale deed was executed would have been relevant only if the respondents were to challenge the sale deed which is operating in favour of the plaintiff. In other words, so long as the validity of such sale deed was not challenged, merely because some contention is raised in the written statement or for that matter adverted to by the trial court in the Judgment in paragraph-8, does not mean that the issue had arisen for consideration. The appellant is therefore, right in contending that the issue as to whether the appellant was an agriculturist at the relevant time was jointly not framed by the trial Court, as it was not relevant to decide the point in issue having regard to the frame of suit filed by the appellant. Moreover, the respondents did not make any grievance about non-framing of the said issue and perhaps advisedly. Merely because the trial Court dealt with the aspect in the Judgment in paragraph-8 that does not mean that said issue arose for consideration of the court.

10. Viewed thus, question of framing issue as to whether the plaintiff is/was an agriculturist at the

relevant time is unwarranted and for the same reason the direction given by the Lower Appellate Court to the Trial Court to frame the issue to be decided by the appropriate authority cannot be sustained.

11. Accordingly, this appeal will partly succeed to the extent of setting aside the view expressed by the Appellate Court that it was necessary to frame issue as to whether the plaintiff was an agriculturist at the relevant time to be decided by the appropriate authority and also direction given to the Trial Court in that behalf.

12. The trial Court will however, examine the issue No.4 as per the remand order passed by the Lower Appellate Court and proceed to hear and decide the suit limited to Issue No.4 as per the remand order and not reopen the entire case. In the first instance, the Trial Court would refer Issue No.4 to be decided by Competent authority and on receipt of such findings pass appropriate orders as may be advised.

13. While parting, it is necessary to observe that this court has not expressed any opinion on the question as to whether it is open to the respondents

to challenge the validity of registered sale deed dated 22nd June, 1967 operating in favour of the appellant/plaintiff. If such proceedings are taken out by the respondents, the same will have to be decided on its own merits in accordance with the law, uninfluenced by the observations made by the trial court or for that matter appeal court in the impugned Judgment.

14. It is further clarified that after the trial Court decides the suit in terms of the remand order passed by the lower Appellate Court which has been upheld by this order to the limited extent referred to above, if the said decision is adverse to the respondents, it will be open to the respondents to agitate or question the correctness of all findings recorded by the trial court in the Judgment and decree dated 30th December, 2003 as also this finding on issue No.4 after conclusion of the remand proceedings before the first Appellate Court. In that event the first Appellate Court will consider the entire matter afresh with regard to the issues that may arise for its consideration.

15. Appeal partly allowed on the above terms. No order as to costs. Civil application disposed of

accordingly.